Office-Supreme Court, U.S.
FILED
OCT 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-344

In The

Supreme Court of The United States

October Term, 1983

THE FORMALDEHYDE INSTITUTE, INC. and BORDEN, INC.,

Petitioners,

v.

BAILUS WALKER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

H. BLAIR WHITE*
WILLIAM P. RICHMOND
DAVID D. HILLER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

WALTER W. KOCHER
EDWARD A. MATTO
HARVEY A. ROSENZWEIG
SIDLEY & AUSTIN
BINGHAM, DANA & GOULD

Of Counsel

JOHN J. CURTIN, JR.
JOSEPH L. KOCIUBES
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Counsel for Petitioners

October 13, 1983

*Counsel of Record

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Preliminary Statement

On August 30, 1983, petitioners The Formaldehyde Institute, Inc. and Borden, Inc. filed their Petition for a Writ of Certiorari ("Petition") to obtain review of the decision of the Massachusetts Supreme Judicial Court upholding regulations which banned urea-formaldehyde foam insulation ("UFFI") and which required the removal of UFFI from houses into which it had been installed. On September 29, 1983, the Massachusetts Commissioner of Public Health ("Commissioner") filed his Brief in Opposition to the Petition ("Brief"). Petitioners submit this Reply Brief to correct some of the misconceptions and errors contained in the Commissioner's Brief.

I. The Commissioner's Contention that Petitioners Were Afforded Procedural Due Process Is Contrary to This Court's Decisions and Is Refuted by the Record in This Case.

The Commissioner banned the sale of UFFI, and required its removal from houses into which it had been installed without ever affording petitioners an adjudicatory hearing as required by the United States Constitution. The Commissioner defends his denial of petitioners' constitutional rights on five specific grounds—(1) whatever procedures are afforded by state statute provide, by definition, all the process that is due (Brief, p. 15); (2) by doing business in Massachusetts petitioners assumed the risk of being subjected to the procedures, however arbitrary, set forth in the Massachusetts statute (*id.*, pp. 16-17); (3) notwithstanding express statutory provisions requiring that certain adjudicative facts be found to exist before the Commissioner could ban petitioners' product or order its repurchase, the regulations in this case were a legislative determination requiring no adjudicatory hearing (*id.*, pp. 20-22); (4) notwithstanding the trial court's express findings to the contrary, an adjudicatory hearing would be impracticable or futile (*id.*, pp. 23-28); and (5) if any right to an adjudicatory hearing existed, the trial in the Superior Court met that requirement (*id.*, pp. 29-30). Each of these contentions is either contrary to this Court's decisions or refuted on the face of the record in this case.

The Requirements of Due Process are a Matter of Federal, not State, Law. The Commissioner advances the extraordinary claim that the procedures chosen by the State to regulate business are essentially immune from review under the due process clause. Citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982), the Commissioner states that "[t]he 'legislative process' by which the Commonwealth banned that product 'provides all the process that is due. . .' " (Brief, p. 15). The Commissioner's sweeping proposition is refuted by the very case on which he purports to rely. The Court in *Logan* invalidated a state statute pre-

cisely because the procedures provided in the statute were constitutionally inadequate. *Id.* at 432-33. This Court recognized in the passage cited by the Commissioner that a State is free to create or not to create substantive property interests, but once such property rights exist, "minimum [procedural] requirements [are] a matter of federal law," and are not diminished by the fact that the State may have specified its own lesser procedures. *Id.* at 432, quoting *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980).

Neither are petitioners' constitutional rights diminished by the fact that the statute under which the Commissioner acted has been on the books since 1961. The Commissioner's suggestion (Brief, pp. 16-17) that petitioners assumed the risk of being subjected to the agency's unconstitutional procedures would, if accepted, "allow the State to destroy at will virtually any state-created property interest." *Logan* v. *Zimmerman Brush Co.*, *supra*, 445 U.S. at 432.[1]

The Commissioner's Action Was Essentially Adjudicatory, and an Adjudicatory Hearing Was Readily Feasible. The Commissioner asserts that his regulations established a legislative-type rule requiring no adjudicatory hearing (Brief, pp. 20-22). But the Commissioner's argument is contradicted by the express language of the Massachusetts statute and the record in this case, which demonstrate that the Commissioner's action depended on the existence of specific, individualized facts that could not be rationally determined except through the adjudicatory procedures that petitioners sought. Where adverse administrative action is

[1]The Commissioner's reliance on *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), is also misplaced. The Court in that case sustained a state statute that required that automobile dealers be afforded notice and opportunity for a hearing before a manufacturer could open a new dealership in the same market. The only question was whether a manufacturer was entitled to a prior hearing, not whether, as in this case, a manufacturer could be denied property without ever being afforded a hearing. *Id.*, pp. 104-106.

predicated on such adjudicative facts, this Court's decisions plainly require an adjudicatory hearing at some point. (Petition, pp. 15-17).[2]

The Commissioner's related assertion (Brief, p. 23) that petitioners have failed to show that the ban and repurchase regulations directly affected a small number of manufacturers and that an adjudicatory hearing was feasible is false and misleading.[3] First, the trial court found, and the Supreme Judicial Court did not dispute, that the manufacturers of UFFI, the "targeted group," were "small" in number (C 15) and "an easily identifiable and non-diverse group" (C 16). Second, the trial court expressly found that an evidentiary hearing where petitioners could cross-examine witnesses under oath and present relevant and material evidence was feasible: "Feasibility is essentially a question of fact. Here the facts are such that a hearing was clearly feasible" (C 14).[4]

Respondent's Assertion that the Trial in the Superior Court Afforded Petitioners an Adjudicatory Hearing is Spurious. If the

[2]This Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), on which the Commissioner relies, is not relevant to this case. The regulation at issue in that case concerned general methods to be applied by the Nuclear Regulatory Commission in licensing proceedings to assess certain kinds of environmental effects. Unlike this case, no license or other personal property interest was determined by the rule. Therefore, no one disputed that the regulation was the product of rulemaking or that adjudicatory procedures were required by the Constitution. *Id.*, at 442 n.16.

[3]The Commissioner at footnote 16 asserts, without any basis, that "many" of The Formaldehyde Institute's members were "presumably in the UFFI business." In fact, only petitioner Borden among the 62 Institute members manufactured the components of a foam insulation, and only seven other companies manufactured formaldehyde for any purpose.

[4]The Commissioner further argues at page 27 of his brief that an adjudicatory hearing would have been "futile" because even if he "had managed to corral the entire UFFI industry into one hearing room and

(Footnote continued on next page)

trial court had been permitted to base its judgment on a review of all of the evidence developed through cross-examination at trial, as it first did, the hearing before that court would have satisfied due process. In that event, the decision whether or not to ban UFFI and order its repurchase would have been the result of a sufficient adjudicatory hearing. In overturning the trial court's judgment for the petitioners, however, the Supreme Judicial Court nullified the decision in this case reached after the required adjudicatory hearing. On appeal, the court determined that the trial court could set aside the Commissioner's decision only if it "lacked any rational, conceivable basis" (A17-18) thereby prohibiting the trial court from conducting a meaningful hearing. But the Constitution requires that an adjudicatory hearing be conducted by the decision-maker. The Commissioner's failure to hold an adjudicatory hearing is not cured by speculating, as the Supreme Judicial Court did, that the Commissioner might have reached the same decision if he had followed constitutionally sufficient procedures. A judicial hearing narrowed as it was by the Supreme Judicial Court is simply not "an opportunity . . . at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), to present evidence to the decision-maker that UFFI was not a "hazardous-substance."[5]

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then issued a regulation, that regulation would . . . be ineffective against any new corporate 'person' which subsequently entered the UFFI business." This contention is frivolous. The Constitution requires a meaningful opportunity to be heard. It does not require the State to make certain that every person who may be affected by the State's action take advantage of the opportunity provided. All the Commissioner was required to do by the Constitution is give notice and provide an opportunity for an adjudicatory hearing.

[5]In fact, contrary to the Commissioner's statement, petitioners won in the trial court. And the fact that petitioners prevailed at trial demonstrates that where a decision concerning the hazardousness of UFFI was based on a full record after an adjudicatory hearing where cross-examination was permitted, a reasonable decision-maker could not sustain a ban and repurchase of the product.

II. The Commissioner's Contention That There Was A Rational Basis For The Ban And Repurchase Regulations Is Without Foundation.

At page eight of his brief, the Commissioner asserts that the ban and repurchase regulations are rational because in the words of the Supreme Judicial Court "there was evidence before the judge *indicating that UFFI would potentially in some conditions emit formaldehyde* into houses at levels above which at least a significant portion of the population would experience adverse health effects" (A 25). That UFFI has "the potential in some conditions" to emit levels of formaldehyde that may affect some people does not provide a rational basis for the Commissioner's ban and repurchase regulations.[6] Indeed, the Commissioner's reliance on such a statement merely highlights the total lack of evidence justifying his action. It must be remembered that formaldehyde is found in all human environments. "It is present in every cell in the human body and in the atmosphere." *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137, 1140 (CA 5 1983). To justify ban and repurchase regulations on the ground that the product has the potential to release a common chemical that may affect some people at some level would mean that the Commissioner would have authority to ban virtually any chemical in commercial use.[7]

A product cannot rationally be banned when no effort has been made to determine what, if any, risk of harm or discomfort is as-

[6]The trial court expressly found: ". . . [T]here is no rational basis upon which one may conclude that it is likely that significant numbers of persons will experience . . . 'substantial' injury or illness as the proximate result of formaldehyde exposure from UFFI insulation when it is properly installed" (C 18).

[7]*Cf. Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 633-64 (1980) (Burger, C.J., Concurring) ("When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.")

sociated with use of the product. The Commissioner, however, made no attempt to determine whether UFFI posed a significant risk of injury to the people of Massachusetts because of the product's alleged emission of formaldehyde. At no time did the Commissioner attempt to determine the amount of formaldehyde that UFFI contributed to the indoor environment, the levels of formaldehyde in UFFI houses compared with non-UFFI houses, how many people were affected by UFFI, or whether more people experienced physical symptoms in UFFI houses than in houses without UFFI. Moreover, repurchase of UFFI is required by the Commissioner's regulations even if the formaldehyde level in a particular UFFI home is less than the formaldehyde level in the outside air. As the trial court concluded: "[F]or an agency to promulgate administrative regulations rooted in ignorance, leaving the important issues of causal connection and contribution and incident rates unanswered and, indeed, even unexplored, is to perform its agency function in an irresponsible and totally arbitrary manner" (C 17).

The ban and repurchase regulations are irrational because the Commissioner chose to remain ignorant of crucial facts regarding the alleged hazard posed by UFFI. The Commissioner's conclusion that UFFI may cause substantial injury is afflicted by the same fatal flaw that lead the Fifth Circuit to set aside the Consumer Product Safety Commission's finding that UFFI posed an unreasonable risk of injury: "The failure to quantify the risk at the exposure levels actually associated with UFFI is the finding's Achilles heel. Predicting how likely an injury is to occur, at least in general terms, is essential to a determination of whether the risk of that injury is unreasonable."* *Gulf South Insulation, supra,*

*The Commissioner's reliance on *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) is misplaced. *Clover Leaf* involved a challenge to a state statute banning the use of plastic nonreturnable, nonrefillable containers on the ground that the statute violated the Equal Protection Clause of the Fourteenth Amendment. Petitioners here do not claim

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701 F.2d at 1148. The Commissioner's actions were arbitrary precisely because he acted without knowledge, or a rational basis to believe, that UFFI was likely to threaten any harm.

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that the regulations at issue are unconstitutional because the Commissioner singled out UFFI rather than many other household products that may emit formaldehyde. Moreover, in *Clover Leaf* there was "no serious doubt" that the plastic containers caused environmental problems, and thus no substantial question that their ban was reasonably related to a permissible goal. In contrast, in this case there is no reasonable evidence supporting a conclusion that UFFI poses a hazard such that it should be banned and removed from houses into which it has been installed.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted and the decision of the Massachusetts Supreme Judicial Court reversed.

Respectfully submitted,

H. BLAIR WHITE*
WILLIAM P. RICHMOND
DAVID D. HILLER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JOHN J. CURTIN, JR.
JOSEPH L. KOCIUBES
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Counsel for Petitioners

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EDWARD A. MATTO
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BINGHAM, DANA & GOULD

Of Counsel

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*Counsel of Record